Proven Development Sdn Bhd v Hongkong and Shanghai Banking Corp

HIGH COURT (KUANTAN) — CIVIL SUIT NO 23–148 OF 11987
ARIFIN ZAKARIA J
17 FEBRUARY 1998

Banking *— Banker and customer — Authorization — Current account — Bank debited company's account on oral instruction by co-director — Whether bank debited company's account without proper authority as required by company's resolution — Whether there was ratification of the oral instruction by directors of the company*

Limitation *— Money deposited — Commencement of limitation period — Whether limitation period commenced when alleged unauthorized debits arose — Whether it commenced when demand was made against bank or when account was closed*

Pursuant to the board of directors' resolution ('the resolution'), the plaintiff ('the company') opened a current account with the defendant ('the bank'). On oral instruction by DW2, a co-director of the company, the bank debited the company's account. The company claimed for the recovery of the debited sums alleging that the bank had debited the company's account without proper authority as required by the resolution. The bank contended that the company's claim was statute-barred because the alleged unauthorized debits arose in 1976 and the suit was only filed in 1986. It was also contended that the oral instruction was ratified by the directors of the company but because of lapse of time the bank was unable to produce the same. PW2, a co-director of the company, denied having signed any letter of authorization or having knowledge of the debits.

Held, dismissing the claim:

(1) Time did not start to run until a demand was made against the bank or alternatively from the date the bank closed the company's account, ie on 5 July 1985. In the present case, the date of the closure of the company's account by the bank was the more appropriate date. Taking either the date of demand or the date of the closure of the company's account, the company's claim was not statute-barred (see p 155E and G); *Re Russian Commercial and Industrial Bank* [1955] Ch 148 followed.

(2) The instruction as provided in the resolution must be in writing since it required the signatures of both the directors. However, oral instruction given to the bank was capable of ratification by the directors. A written ratification, if there was any, would in all probabilities have been destroyed together with other vouchers because of time lapse. But the absence the document did not conclusively show that the company's directors had not ratified the transactions in question. Other evidence relevant to this issue had to be considered. In the instant case, there did not seem to be any query by the company concerning the account. The

account for the year 1977 also did not show any irregularities. This supported the bank's contention that the debits were duly ratified by the company's directors. Furthermore, from the evidence, it was more probable that PW1 knew about the debits and had in fact consented to the same. In the circumstances, the claim by the company was more of an afterthought prompted by the inability of the bank to furnish the necessary documents relating to the disputed debits (see p 160C–E).

(3) It was incumbent upon the company to inform the bank of any irregularity in the company's account as soon as the company became aware of it. The company failed to inform the bank of the alleged irregularities in the account as soon as the same came to the attention of their directors and waited nine years before bringing this suit. This was certainly to the prejudice of the bank and in the circumstances, the company should be estopped from claiming against the bank for the loss arising therefrom (see p 160F–G); *United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd* [1993] 1 MLJ 182 followed.

(4) The mandate as contained in para 4 of the resolution could not be read to confer upon either DW2 or PW1 the authority to issue 'instruction' to the bank to effect any withdrawal from the company's account. It merely authorized either one of the directors to make arrangement with the bank for advances to the company and to sign on behalf of the company any forms of deposit and withdrawal to secure the said advances. Therefore, the bank could not properly rely on para 4 as affording any defence against the company's claim (see pp 160I and 161B).

[Bahasa Malaysia summary

Mengikut resolusi lembaga pengarah ('resolusi tersebut'), plaintif ('syarikat tersebut') telah membuka akaun satu semasa dengan defendan ('bank tersebut'). Di atas arahan lisan DW2, pengarah bersama syarikat tersebut, bank tersebut telah mendebitkan akaun syarikat tersebut. Syarikat tersebut menuntut untuk mendapat kembali jumlah-jumlah yang didebit dengan mangatakan bahawa bank tersebut telah mendebitkan akaun syarikat tersebut tanpa kuasa sah seperti yang diperlukan oleh resolusi tersebut. Bank tersebut menegaskan bahawa tuntutan syarikat tersebut adalah dihalang oleh statut sebab debit-debit tersebut yang dikatakan yang tidak diberikuasa telah timbul pada 1976 dan guaman hanya difailkan pada 1986. Ia juga telah ditegaskan bahawa arahan lisan tersebut diratifikasi oleh pengarah-pengarah syarikat tersebut tetapi kerana keluputan masa, bank tersebut tidak dapat mengeluarkan yang sama. PW2, seorang pengarah bersama syarikat tersebut, menafikan yang dia telah menandatangani sebarang surat berikuasa atau mempunyai pengetahuan tentang debit-debit tersebut.

Diputuskan, menolak tuntutan tersebut: A

(1) Masa tidak bermula sehingga satu tuntutan dibuat ke atas bank tersebut atau sebagai alternatif dari tarikh bank tersebut telah menutup akaun syarikat tersebut, iaitu pada 5 Julai 1985. Dalam kes semasa, tarikh penutupan akaun syarikat tersebut oleh bank tersebut adalah tarikh yang lebih sesuai. Mengambil tarikh B tuntutan atau tarikh penutupan akaun syarikat tersebut, tuntutan syarikat tersebut tidak dihalang oleh statut (lihat ms 155E dan G); *Re Russian Commercial and Industrial Bank* [1955] Ch 148 diikut.

(2) Arahan yang diberi di dalam resolusi mestilah di dalam tulisan kerana ia memerlukan tandatangan kedua-dua pengarah. Walau C bagaimanapun, arahan lisan yang diberi kepada bank tersebut boleh diratifikasi oleh pengarah-pengarah. Ratifikasi bertulis, jika ada, akan kemungkinannya dimusnah bersama baucar-baucar yang lain kerana keluputan masa. Tetapi ketiadaan dokumen tersebut tidak menunjukkan dengan muktamad bahawa pengarah-pengarah tersebut tidak meratifikasi transaksi-transaksi yang D dipersoalkan. Keterangan lain relevan kepada isu ini mesti dipertimbangkan. Dalam kes ini, tidak terdapat sebarang pertanyaan mengenai akaun tersebut. Akaun untuk tahun 1977 juga tidak menunjukkan sebarang yang di luar aturan. Ini menyokong tegasan bank tersebut bahawa debit-debit tersebut E telah diratifikasi oleh pengarah-pengarah syarikat tersebut. Tambahan pula, dari keterangan, ia adalah lebih berkemungkinan bahawa PW1 ketahui mengenai debit-debit tersebut dan telah setuju dengannya. Dalam keadaan ini, tuntutan oleh syarikat tersebut adalah fikiran kemudian yang digalakkan oleh ketidakmampuan bank tersebut untuk memberi dokumen- F dokumen yang diperlukan mengenai debit-debit yang dipertikaikan (lihat ms 160C–E).

(3) Ia adalah kewajipan syarikat tersebut untuk memberitahu bank tersebut tentang sebarang keluaraturan dalam akaun syarikat tersebut sebaik sahaja syarikat tersebut mengetahuinya. Syarikat G tersebut telah gagal memberitahu bank tersebut tentang keluaraturan-keluaraturan yang dikata dalam akaun tersebut sebaik sahaja ia datang pada perhatian pengarah-pengarahnya dan telah menunggu sembilan tahun untuk memulakan guaman ini. Ini semestinya memudaratkan bank tersebut dan dalam keadaan ini, syarikat tersebut patut diestop dari menuntut dari H bank tersebut kerugian yang timbul dari situ (lihat ms 160F–G); *United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd* [1993] 1 MLJ 182 diikut.

(4) Mandat yang terkandung di dalam perenggan 4 resolusi tersebut tidak boleh dibaca sebagai memberi DW2 atau PW1 kuasa untuk I mengeluarkan 'arahan' kepada bank tersebut untuk menlaksanakan sebarang pengeluaran dari akaun syarikat tersebut. Ia hanya memberi kuasa kepada satu daripada pengarah-pengarah tersebut untuk membuat perkiraan dengan bank tersebut untuk

pendahuluan kepada syarikat tersebut dan untuk menandatangani atas pihak syarikat tersebut sebarang borang-borang simpanan and pengeluaran untuk menjamin pendahuluan-pendahuluan tersebut. Oleh kerana itu, bank tersebut tidak boleh bergantung dengan sempurna kepada perenggan 4 sebagai memberi sebarang pembelaan terhadap tuntutan syarikat tersebut (lihat ms 160I dan 161B).]

Notes

For cases on banker and customer, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1033–1062.

For cases on limitation period for recovery of money deposited, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1859–1860.

Cases referred to

Kepitigalla Rubber Estates Ltd, The v National Bank of India Ltd, The [1909] 2 KB 1010 (refd)

N Joachimson (A Firm Name) v Swiss Bank Corp [1921] 3 KB 110 (refd)

NN Sockalingam Chettiar v ARSP Palaniapa Chettiar [1935] MLJ 74 (refd)

Redmond v Allied Irish Banks plc [1987] FLR 307 (refd)

Russian Commercial and Industrial Bank, Re [1955] Ch 148 (folld)

Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd & Ors [1986] AC 80 (refd)

United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd [1993] 1 MLJ 182 (folld)

Ramdas Tikamdas (*Siva Ram & Associates*) for the plaintiff.

Ahmad Shah Balendran (*Ranjit Singh Virik* with him) (*Balendran Chong & Bodi*) for the defendant.

Arifin Zakaria J: The plaintiff is a company formerly known as Chong Bee Development Sdn Bhd. Pursuant to the board of directors' resolution of 16 September 1975 ('the directors' resolution') the plaintiff opened a current account with the defendant bank at its Kuantan branch. On the oral instructions of Ng Say Bee (DW2) — who was then one of the co-directors of the plaintiff — the defendant debited the plaintiff's account on three occasions between August 1976 to September 1977 totalling in all RM115,000. The plaintiff now claims for the recovery of the said sum together with interest thereon at the prevailing bank's rate of interest on unsecured loans from the respective dates on which the debits were made. The plaintiff alleged that the defendant had fraudulently debited the plaintiff's account and/or without the proper authority as required by the directors' resolution. Alternatively the plaintiff alleged that the defendant had wrongfully and/or fraudulently converted the said sum to the defendant's own use and hence wrongfully and/or fraudulently deprived the plaintiff thereof. The plaintiff also claims against the defendant in the

alternative for money had and received by the defendant for the use of the plaintiff and as such are liable to pay the said sum to the plaintiff. In his written submission the learned counsel for the plaintiff had chosen to abandon the allegation of fraud against the defendant.

Lee Chong Heng (PW2) who was one of the co-directors of the plaintiff at the material time is the principal witness for the plaintiff. The following facts appear from his testimony. He stated that at the material time, he and Ng Say Bee (DW2) were the two directors of the plaintiff company. He was then taking charge of the site office in Jerantut while Ng Say Bee was in charge of the administrative office in Kuantan. It is not disputed that at that time the Jerantut project was the only project the plaintiff was engaged in. Sometime in 1985, he said, Ng Say Bee left the plaintiff company and was replaced by En Abbas. Encik Abbas had asked him to go through the plaintiff's account and in so doing he found the three debit notes namely IDP5, IDP8 and IDP9 which indicated that the plaintiff's account were debited on the three occasions and the amounts so debited were then credited into the account of Bee Brothers Development, a company substantially owned by Ng Say Bee.

Ng Say Bee in his testimony admitted that all the three debits were made by the defendant acting on his oral instruction which he gave to the defendant bank through the branch manager of the defendant. However, he said, on all the three occasions he had asked for and obtained the prior consent of Lee Chong Heng, the other co-director. In his own words, he described how the three debits had taken place.

> When I needed money and that time PW2 was in Jerantut and the cheque was with PW2, with the permission of PW2, I requested Hongkong & Shanghai Bank to transfer the money to my account.

An officer of the defendant, Ong Boon Gee (DW1) in cross-examination confirmed that the bank may at its discretion act on the customer's oral instruction but in such circumstances the customer will be asked to follow up with written instruction. When asked about the written instruction or confirmation in respect of the three debits herein, he stated that it could have been destroyed together with other vouchers because of time limitation. He said according to the defendant's internal procedure the time limitation is seven years from the date of transaction. Lee Chong Heng in his testimony denied having signed any letter of authorization.

One of the defences raised by the defendant is that this claim by the plaintiff is statute-barred. It is the defendant's contention that the subject matter of this suit — the alleged unauthorized debits of the plaintiff's account — arose sometime between 1976 and 1977. The defendant contended that the plaintiff could have discovered the same not long thereafter had the plaintiff exercise reasonable care and diligence. The present suit was only commenced by the plaintiff on 2 May 1986, some nine years after the disputed debits. The defendant contended that in the circumstances of this case the plaintiff is out of time in filing this suit.

In reply, the plaintiff contended that this claim is a claim on account held with the defendant and as such the cause of action does not arise until

a claim is made by the plaintiff against the defendant. In support the plaintiff referred me to the case of *N Joachimson (A Firm Name) v Swiss Bank Corp* [1921] 3 KB 110. There the Court of Appeal held that where money is standing to the credit of a customer on current account with a banker, in the absence of a special agreement, a demand by the customer is a necessary ingredient in the cause of action against the banker for money lent. In that case Atkin LJ at p 131 further remarked that:

> The result of this decision will be that for the future bankers may have to face legal claims for balances on accounts that have remained dormant for more than six years.

In *NN Sockalingam Chettiar v ARSP Palaniapa Chettiar* [1935] MLJ 74, the Court of Appeal following *Joachimson* held that where a customer deposits money with his banker such money being repayable on demand, the period of limitation does not begin to run until a demand for payment is made.

To further reinforce their case, the plaintiff contended that in the present case the defendant themselves had claimed from the plaintiff outstanding sums in respect of the account vide their letter of 27 September 1984 (IDD8) and the defendant only closed the plaintiff's account on 5 July 1985.

On the authorities cited above, I agree with the plaintiff's contention that time does not start to run until a demand is made against the defendant or alternatively from the date the defendant closed the plaintiff's account, ie on 5 July 1985. In the present case, I am of the opinion that the date of the closure of the plaintiff's account by the defendant is the more appropriate date. (See *Re Russian Commercial and Industrial Bank* [1955] Ch 148.) In that case Wynn Perry J held, inter alia, that on termination of the banker and customer relationship any balance belonging to the customer in the hands of the banker becomes payable to the customer, without demand.

Taking either the date of demand or the date of the closure of the plaintiff's account I hold that this claim by the plaintiff is not statute-barred.

I now move to consider the merits of the plaintiff's claim. In essence, the plaintiff's claim is that the three debits were not duly authorized by the plaintiff and the defendant is therefore liable to the plaintiff for the sums debited. In considering this, it is necessary to appreciate the legal ramifications that follow the banker and customer relationship which comes into existence upon the customer opening a current account with a bank. The clearest statement I find is that of Atkin LJ in *Joachimson v Swiss Bank Corp* which reads as follows (at p 127):

> ... The bank undertakes to receive money and to collect bills for its customer's account. The proceeds so received are not to be held in trust for the customer, but the bank borrows the proceeds and undertakes to repay them. The promise to repay is to repay at the branch of the bank where the account is kept and during banking hours. It includes a promise to repay any part of the amount due against the written order of the customer

addressed to bank at the branch, and as such written orders may be outstanding in the ordinary course of business for two or three days; it is a term of the contract that the bank will not cease to do business with the customer except upon reasonable notice. The customer on his part undertakes to exercise reasonable care in executing his written orders so as not to mislead the bank or to facilitate forgery. I think it is necessarily a term of such contract that the bank is not liable to pay to the customer the full amount of this balance until he demands payment from the bank at the branch at which the current account is kept. Whether he must demand it in writing, it is not necessary now to determine.

The duty of care of banker in relation to forged cheque and the extent of duty owed by customer to the bank was discussed at length by the Privy Council in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd & Ors* [1986] AC 80. In that case, an account clerk forged the managing director's signature on about 300 cheques purporting to be drawn by the company totalling approximately HK5.5m. The banks honoured the cheques on presentation and debited them against the company's accounts. The company's system of internal financial control was not adequate to prevent or detect forgery and so the forgeries were not discovered until a later date. In the suit filed by the company against the three defendant banks, the Privy Council in allowing the appeal by the company held, inter alia:

(i) By authority, the only duties in connection with the operation of a current bank account that a customer owed to his bank, in the absence of express agreement, were a duty to exercise due care in drawing cheques so as not to facilitate fraud or forgery, and a duty to notify the bank immediately of any unauthorized cheques of which he became aware; that no wider duty, requiring a customer to take reasonable precautions in the management of his business to prevent forged cheques being presented to the bank for payment, or to take such steps as a reasonable customer would to check the periodic bank statements in order to be able to notify the bank of any items which were not, or might not have been, authorized, could be implied into banking contracts as a necessary incident of the relationship of banker and customer; and that, therefore, the banks were not relieved by any breach of duty by the company from having to bear the loss occasioned by the forged cheques.

(iii) That since the company was not in breach of any express or implied duty owed to the banks it was not estopped from asserting that the accounts had been incorrectly debited, and that, accordingly, the banks not having authority to pay the forged cheques or debit them to the company's accounts had to pay those sums to the company together with interest from the date the writ was issued even though the accounts were not interest-bearing.

In *The Kepitigalla Rubber Estates Ltd v The National Bank of India Ltd* [1909] 2 KB 1010, the court emphasized that the duty of customer of the bank in issuing mandates to the bank is to take reasonable care so as not to mislead the bank; but, beyond the care which must be taken in or immediately connected with the transaction itself, there is no duty on the

part of customer to take precaution in the general course of carrying on his business to prevent forgeries on the part of his servants.

In the local case of *United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd* [1993] 1 MLJ 182, the Supreme Court following the English cases held that at common law a customer owes his banker only two duties. The first is to refrain from drawing a cheque in such a manner as may facilitate fraud or forgery. The second is a duty to inform the bank of any forgery of a cheque purportedly drawn on the account as soon as the customer becomes aware of it. However, there does not exist at common law a further duty on the part of the customer to take precautions in the general course of his business to prevent forgeries on the part of his servants. Neither is there at common law, in the absence of a contract to the contrary, a duty imposed upon the customer to inspect his periodical bank statements to ensure that his account is being properly maintained by the bank.

It is also to be observed that banker is bound by contract to observe the mandate given by the customer and any breach of that mandate unless ratified by the customer would tantamount to a breach of that contract. And as stated by Saville J in *Redmond v Allied Irish Banks plc* [1987] FLR 307:

> There is clear authority for the proposition that a bank owes its customer a duty to take reasonable care and skill in interpreting, ascertaining and acting in accordance with the instruction of his customer.

At this juncture it may be appropriate to consider the mandate given to the defendant in this case, the relevant part of which reads as follows:

> 2 That the bank be instructed to honour all cheques, promissory notes and other orders drawn by all bills accepted on behalf of the company whether such accounts be in credit or overdrawn, and to accept and act upon receipts for monies deposited with or owing by the bank on any account or accounts at any time or times kept or to be kept in the name of the company provided that such cheques, notes, bills orders or receipts are signed by *Mr Ng Say Bee and Mr Lee Chong Heng* and such signature(s) shall be a sufficient authority and bind the company in all transactions between the bank and the company including those specifically referred to. The bank shall be furnished with the names of these signatories, and notified of any changes, under the hand of the chairman. ...
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> 4 That *Mr Ng Say Bee or Mr Lee Chong Heng* be authorized to arrange with the bank for advances to the company by way of discount, loan, overdraft or otherwise from time to time as required, and to sign on behalf of the company any forms of deposit and withdrawal, and letters of trust and hypothecation relating to any securities or property or documents of title relating thereto to secure the said advances and any obligations, undertakings, instructions, indemnities and counter-indemnities, and any other documents which may be required by the bank in connection with the company's business.

Mr Ramdas Tikamdas, the learned counsel for the plaintiff contended that under para 2 of the mandate the signatures of both Ng Say Bee and Lee

Chong Heng are required for all cheques, etc and all bills accepted on behalf of the plaintiff. In this case, since the defendant through their own witness had admitted that the instruction to debit the plaintiff's account was given by Ng Say Bee over the phone, therefore, clearly there is a breach of the mandate as contained in para 2, which by implication requires the instruction to be in writing. The said mandate, he said, does not, in any circumstances, allow the defendant to act on the oral instruction of any one or both the directors.

Reading para 2 of the board of directors' resolution, I fully agree with the plaintiff that the instruction as provided in para 2 has got to be in writing since it requires the signatures of both the directors. However, as admitted by the learned counsel in his submission, oral instruction given to the defendant is capable of ratification by the directors. The defendant contended that such ratification had been given by both the directors of the plaintiff but because of lapse of time the defendant is unable to produce the same. This raises the question of facts for the determination of this court whether both the directors had consented to the said debits and had there been ratification of the same. To determine this issue, it is necessary to examine closely the evidence of Ng Say Bee and Lee Chong Heng.

Ng Say Bee in his evidence stated that he gave oral instruction to the branch manager of the defendant to debit the plaintiff's account and to credit the same into the account of Bee Brothers. On each occasion, he said, he spoke to the other director (Lee Chong Heng) and asked for his permission. Lee Chong Heng on the other hand not only denied having given the permission but denied any knowledge of the same. He said the debits only came to light when he was instructed by the new director, En Abbas, to examine the plaintiff's account after Ng Say Bee left the plaintiff company.

It is pertinent to note that En Abbas was not called by the plaintiff to support Lee Chong Heng's story as to what had prompted him to go through the plaintiff's accounts or, as the learned counsel for the defence put it, to conduct a 're-audit of the plaintiff's accounts from the date of its inception'. Without the evidence of En Abbas, I agree with the defendant's submission that, that part of the evidence of Lee Chong Heng is merely hearsay. Therefore, it remains an open question as to what really prompted Lee Chong Heng to go through the accounts of the plaintiff if at all he did so. The question is was he telling the truth about the so called instruction that he allegedly received from En Abbas or could it be that he made this up in order to lend credence to his allegation that he had no prior knowledge about the three debits. The answer to these questions, in my opinion, is crucial to the issue before the court, ie whether Lee Chong Heng knew about the three debits and had in fact given permission to Ng Say Bee for the same.

To further support his story that he had no knowlegde of the three debits, Lee Chong Heng in his testimony said that during the material period Ng Say Bee was solely in charge of the company's finances and he never had sight of the said debit notes. However, it is not disputed that the

bank's statements and the relevant debit notes were sent to the plaintiff. Lee Chong Heng further stated that the plaintiff's main business at that time was the housing project in Jerantut and he was wholly in charge of the said project. In his testimony he said:

> My duty in the company is to take care of the company's development project in Jerantut. I do sign the cheque of the company for expenditure. I was based in Jerantut. I have to come to Kuantan once or twice a week to sign any cheque and also attend meetings of the board. ... . The company had a current account with the defendant bank. All the company's money is put in this account ... (para C–F p 9 notes of evidence).

In the light of Lee Chong Heng's own testimony, it is highly unlikely for him to be completely ignorance of the company's account as claimed by him. For a person who was in charge of the one and only project of the company it is hard to believe that he was ignorant of the company's account. How could he be making payments to the contractors involved with the project if he was not aware of the plaintiff's financial position? He being one of the two directors was also required to sign cheque for the plaintiff from time to time. It is highly untenable that he merely signed the cheque without regard to the plaintiff's account. In my opinion, Lee Chong Heng's evidence in this regard could not be believed.

Apart from that, according to Ng Say Bee the accounts of the plaintiff for 1975, 1976 and 1977 were drawn up by Lee Chong Heng himself because at that time the plaintiff did not have an account clerk as the company was just formed. It is also worth noting that Lee Chong Heng had worked as an account clerk with Pahang Realty prior to starting the plaintiff company and he is also a graduate from Nanyang University of Singapore specializing in account. With those backgrounds it is highly unlikely and incredible, to say the least, that Lee Chong Heng was ignorant of the plaintiff's account.

Judging from the evidence before me, it is more probable that Lee Chong Heng knew about the debits and had in fact consented to the same and this claim by the plaintiff would not have arisen but for the fact that the defendant is now unable to furnish the necessary documents to prove that Lee Chong Heng had authorized the said debits. In his own evidence Lee Chong Heng stated that he cannot remember whether or not he authorized the defendant to debit the plaintiff's account, but, because the defendant is unable to produce any documentary proof to support their claim, therefore, he claimed that he had not authorized the disputed debits. The evidence of Lee Chong Heng is in complete contrast with that of Ng Say Bee, who in no uncertain terms, stated that he authorized the debits with the permission of Lee Chong Heng. Considering the evidence of both Lee Chong Heng and Ng Say Bee, I find that the evidence of Ng Say Bee is more credible. When questioned by learned counsel for the plaintiff he unhesitatingly stated that he gave his instruction to the branch manager of the defendant bank through the phone. He also told the court that he knew the manager when the manager was first posted to Kuantan. This is the evidence of the man who has nothing to hide.

Further, Lee Chong Heng in his evidence did not say that he had any problem in tracing the debit notes from the plaintiff's records. If at all, it is true that Ng Say Bee had surreptitiously debited the accounts of the plaintiff, it is reasonable to expect that he would have taken the necessary step to avoid discovery. There is no evidence indicating that Ng Say Bee had taken such step in dealing with the three debits. In fact he said he gave the three debit notes to Lee Chong Heng when the latter came to the office in Kuantan. Judging from the above, I am inclined to think that Lee Chong Heng was fully aware of the three debit notes and had in fact given his permission to Ng Say Bee for the said debits.

Since the instructions to debit the plaintiff's account on all the three occasions were not in writing, therefore, as rightly submitted by Mr Ramdas, ratification by the two directors of plaintiff is necessary. Encik Ong Boon Gee (DW1) in re-examination stated that it is possible that a written instruction or confirmation from the plaintiff's directors could have been destroyed together with other vouchers because of time lapse. I have no doubt that a written ratification, if there is any, would in all probabilities have been destroyed for the said reason. But the absence of such a document does not conclusively show that the plaintiff's directors had not ratified the transactions in question. We have to consider all other evidence relevant to this issue. In the instant case, there does not seem to be any query by the plaintiff concerning the account: not until Lee Chong Heng decided to conduct 'a re-audit' of the plaintiff's account. The plaintiff's account for the year 1977 also does not show any irregularities. All these, to my mind, go to support the defendant's contention that the debits were duly ratified by the plaintiff's directors. In the circumstances herein, I am more inclined to think that the claim by the plaintiff is more of an afterthought prompted perhaps by the inability on the part of the defendant to furnish the necessary documents relating to the disputed debits.

Further, following the Federal Court decision in *United Asian Bank Bhd v Tai Soon Heng*, I am of the opinion that it is incumbent upon the plaintiff to inform the defendant bank of any irregularity in the plaintiff's account as soon as the plaintiff becomes aware of it. I find that the plaintiff herein failed to inform the defendant of the alleged irregularities in the plaintiff's account as soon as the same came to the attention of their directors. The plaintiff waited nine years before bringing this suit. This is certainly to the prejudice of the defendant and in the circumstances, the plaintiff should be estopped from claiming against the defendant for the loss arising therefrom.

Finally, it is contended on behalf of the defendant that it had acted within the ambit of the mandate as contained in para 4 of the board of directors' resolution. It is submitted that on the terms of para 4 of the directors' resolution, the defendant is authorized to act on the instruction of either Ng Say Bee or Lee Chong Heng. Since in this case Ng Say Bee had admitted in his evidence that he had instructed the bank to debit the plaintiff's account on all the three occasions, therefore, the defendant had not acted in breach of the said mandate. With respect, I could not agree with the defendant on their interpretation of para 4. In my opinion, para 4

could not be read to confer upon either Ng Say Bee or Lee Chong Heng the authority to issue 'instruction' to the defendant to effect any withdrawal from the plaintiff's account. The said paragraph merely authorizes either one of the directors to make arrangement with the defendant for advances to the plaintiff company and to sign on behalf of the plaintiff any forms of deposit and withdrawal, etc to secure the said advances and any obligations, undertakings, instructions, indemnities and counter-indemnities. The word 'instructions' in the context of para 4, in my opinion, could not be read to confer on either Ng Seng Bee or Lee Chong Heng the authority to issue any instruction to the defendant to debit the plaintiff's account as had occured in the present case. Therefore, I hold that the defendant could not properly rely on para 4 of the directors' resolution as affording any defence against the plaintiff's claim.

Be that as it may, this does not derogate from earlier findings that the plaintiff through its directors had ratified the said debits and that the plaintiff is in breach of it's duty to the defendant in failing to inform the defendant as soon as possible of any irregularity in the plaintiff's account. For the above reasons, I dismissed the plaintiff's claim herein with costs.

Claim dismissed.

Reported by Jafisah Jaafar